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IN THE

Supreme Court of the United States

October Term, 1952

No. 283

MORRIS GORDON,
Petitioner,

vs.

MIRIAM GORDON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MIRIAM GORDON, respondent, submits this, her brief, by her undersigned counsel.

INTRODUCTORY STATEMENT

The respondent, MIRIAM GORDON, was plaintiff in the cause lately pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, in Dade County sitting and was appellee in the appeal from the final decree which reversed that final decree and returned the cause to rules, (*Gordon v. Gordon,* 160 Fla. 838, 36 So. 2d. 774, 4 ALR 2nd 102). Thereafter the cause proceeded to another final decree and respondent was again appellee in the case of Gordon v. Gordon lately pending

in the Supreme Court of the State of Florida which resulted in an opinion and mandate affirming the said final decree, which opinion is reported in 59 So. 2d, 40. That opinion was filed on May 2, 1952, and the petitioner, who was appellant below, now seeks a Writ of Certiorari to review the said opinion and decree of the Supreme Court of Florida. Petitioner's "Summary Statement of Facts" is so argumentive that respondent believes it fails to clearly present the facts upon which the opinion and judgment below was based and, therefore, for the assistance of the Court, respondent respectfully submits this brief.

SUMMARY STATEMENT OF FACTS

"Plaintiff was born December 21, 1919, in Johnstown, Pennsylvania, the daughter of a wealthy family and was, upon reaching maturity, given a partnership interest in her father's business. She had engaged in social welfare work but was not dependent upon any outside income. The defendant was the owner and operator of a filling station. The parties were married March 9, 1941, in Pittsburgh, Pennsylvania, and after a honeymoon at Miami Beach, returned to live at the parents' home in Johnstown, Pennsylvania.

"A baby boy, Allen Richard Gordon, was born on July 24, 1942. Plaintiff experienced considerable difficulty with the birth and required internal and external stitching. Her doctor told her that she should abstain from sexual relations for a period of from five to six months and she so informed the defendant. After about six weeks he insisted upon having sexual relations to which she objected because she feared it would affect her future well being, but he so persisted that she succumbed. Thereafter, repeated demands were made by the defendant and it so affected her health that she was required to be under constant care of a physician.

"On September 24, 1944, while the defendant was in the military service assigned to duty with the United States Navy in Pearl Harbor, and the plaintiff was mak-

ing her home with her parents in Johnstown, Pennsylvania, the child was accidentally drowned in a fish pond. The defendant obtained an emergency furlough and arrived at the plaintiff's parents' home on September (R 479) 30, 1944. The plaintiff met and embraced him but he did not show warm affection for her. On the contrary, he complained about his journey home and his shock at the incident and remarked that he was out fighting the war and that she had neglected the child.

"That night without tenderness or affection the defendant insisted on sexual relations with plaintiff and although she remonstrated with him because of her distraught physical and mental condition she again gave in to his persistence and as a result of this painful experience she was left in a jittery, upset and nervous condition.

"During the following two and half weeks that the parties were together in plaintiff's parents' home after the death of the child, the defendant demanded sexual relations with the plaintiff practically every night in a brutal manner, without any showing of affection or tenderness and would satisfy himself without consideration to the pain caused to the plaintiff and with a total lack of any emotion or affection exhibited by him. These occurrences were over her protests because of the resulting pain and nervousness.

"The defendant kept repeating to the plaintiff during this period that if she had been a good mother the child would not have drowned and that he didn't want any children until he was relieved of his military duties and could return home so that he could watch over the children himself. These remarks and accusations kept plaintiff in a highly upset emotional condition.

"After the visit with plaintiff's parents the parties visited the defendant's parents in New York City where he continued to make onerous demands for sexual relations that were consummated in a brutal manner. He repeated his accusations that plaintiff was a neglectful

mother in the presence of defendant's, (R 480), mother who chided her for not having been more careful.

"When the defendant's furlough expired he returned to camp in Virginia. The plaintiff was too weak to return to her parents' home until after she had received treatments from a physician in New York for two days. The defendant came to Johnstown, Pennsylvania, at Thanksgiving time for two days and she informed him that she couldn't continue to live with him because of his constant accusations of neglect toward the child, and his brutal methods of sexual relations which would require her to constantly be under the care of a physician. The defendant made no apology for his actions and conduct but again sought sexual relations with plaintiff which she refused. About a week after this visit plaintiff had a slight breakdown which she attributed to nervousness as the result of defendant's conduct towards her and about a week later she went to New York where she suffered a complete breakdown and was under a physician's care for approximately two weeks.

"On January 2, 1945, the parties met at the plaintiff's parents' home in Johnstown to talk over their marital situation. Plaintiff told the defendant that she could not continue to live with him and have him continuously castigate her about their deceased child and have him treat her brutally in their sexual relations; that she would live in constant fear under these circumstances and require physician's care continually. Defendant stated that he had a right to feel the way he did, and that he wanted the plaintiff to return to him all of the allotment money which had been sent by him to her as well as the bonds given to her by her parents. Since that date the parties have never lived together." (R 481).

On January 28, 1946, MIRIAM GOLDHABER GORDON, filed her libel in divorce against MORRIS GORDON, in the Court of Common Pleas, Cambria County, Pennsylvania.

"The petition of Miriam Goldhaber Gordon, the above named Libellant, respectfully represents:

"1. That the names of the parties to this proceeding are Miriam Goldhaber Gordon, Libellant, and Morris Gordon, Respondent.

"2. That the time of the marriage of the Libellant and Respondent was the 9th day of March, 1941, the said marriage having been performed by Rabbi Herman Hailperin.

"3. That the place where the said marriage was performed was Pittsburgh, Allegheny County, Pennsylvania.

"4. That the citizenship and domicile of the Libellant at the time of said marriage was Westmont Borough, Cambria County, Pennsylvania, and of the Respondent was the City of Johnstown, Cambria County, Pennsylvania.

"5. That after the said marriage the said Libellant and Respondent lived together as husband and wife in the Borough of Westmont, in the City of Johnstown and in the Borough of Southmont, all in Cambria County, Pennsylvania.

"6. That the Libellant has been a citizen and resident of the State of Pennsylvania for more than one whole year previous to the filing of this Libel in Divorce.

"7. That the present place of actual residence of the Libellant is 100 Marion Street, Westmont Borough, Cambria County, Pennsylvania.

"8. That the present place of actual residence of the Respondent is 3111 Crescent Street, Astoria, State of New York.

"9. The Libellant avers that in violation of the Respondent's marriage vows and the laws of the Commonwealth of Pennsylvania, the said Morris Gordon, Respondent herein named, did on or about the 23rd day of November, 1944, and many times previous to said date, offer such indignities to her person as to render her condition intolerable and her life burdensome.

"WHEREFORE, the Libellant, being a citizen of the Commonwealth of Pennsylvania, as aforesaid, and entitled to the protection and benefits of the laws of said Commonwealth, hereby prays that a subpoena may issue directed to the said Morris Gordon, Respondent, commanding him to appear before your Honorable Court on the First Monday of March, 1946 to answer this Libel and Complaint, and the Libellant further prays that a decree may be entered by your Honorable Court divorcing and separating the said Morris Gordon, Respondent, from the said Libellant's society, fellowship and company in all time to come, and Miriam Goldhaber Gordon, the said Libellant, from the marriage bond aforesaid, as if they had never been married, or as if Morris Gordon, the said Respondent, were naturally dead.

"And thus she will ever pray." (R 110-112).

On April 26, 1946, Morris Gordon entered his appearance in the cause, (R 117), and on May 27, 1946, Morris Gordon filed his answer in the cause, (R 119-122).

While the suit in Pennsylvania was pending and at issue on libel and answer, MIRIAM GORDON, on June 25, 1946, changed her place of residence, establishing her residence in Dade County, Florida and has continuously resided in said State and County ever since, (R 481). On September 30, 1946, (96 days later), MIRIAM GORDON filed her complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida, in Dade County sitting, seeking a divorce from Morris Gordon charging him with extreme cruelty, habitual indulgence in violent and ungovernable temper and wilful, obstinate and continuous desertion for one year, (R 469). On December 2, 1946, defendant, Morris Gordon filed his answer denying that plaintiff was a bona fide resident of the State of Florida and denying all other material allegations of the complaint, (R 469). The case proceeded to trial which terminated on May 28, 1947, (R 469). During the process of the trial in Florida, MIRIAM GORDON, on May 5, 1947, filed, in the Pennsylvania cause, her petition for leave to discontinue it

alleging, among other things, "(6) That the libellant since the filing of said action, moved to Miami Beach, Florida, where she is now making her residence and is no longer a citizen of the Commonwealth of Pennsylvania." (R 123), and on May 13, 1947, the Pennsylvania Court decreed as follows:

> "And now 13 May, 1947, after argument on petition and answer and after due consideration, the libellant's petition to discontinue the above action is hereby denied." (R 126).

On May 14, 1947, the Pennsylvania Court appointed a Master to take testimony and suggest a decree in the case, (R 126). On May 27, 1947, the Pennsylvania cause came on for trial but MIRIAM GORDON, the libellant did not appear nor was she represented by counsel, (R 128). At the conclusion of the taking of the testimony proferred by Morris Gordon, his counsel advised the Master as follows:

> "For the reason that it appears in this case that there is a divorce action pending in Florida, we call to the Master's attention the fact that his Libel in Divorce was filed in Cambria County on the 28th day of January, 1946, and the Answer was filed on the 27th day of May, 1946. The action in the Florida Courts was instituted on the 30th day of September, 1946, many months after the Respondent had filed an Answer in this case.
>
> "The record in this case shows that Miriam Goldhaber Gordon, voluntarily selected the Court of Common Pleas of Cambria County, Pennsylvania, as the form in which she desired to have her charges against her husband litigated, and we are of the opinion that no action she could take in any other State would oust the jurisdiction of the Court of Common Pleas of Cambria County, which is a Court of competent jurisdiction in this type of case, and having concurrent jurisdiction with the Circuit Court of Dade County, we call to your attention the discussion of questions similar to the ones involved in this case and reported in Vol. 14, American Jurisprudence, Section 246.

"We contend that here a Court of competent jurisdiction has equal jurisdiction and subsequently another Court in a different State would likewise be a Court of competent jurisdiction; the jurisdiction is concurrent, but the Court which has first been petition has the right to proceed until its jurisdiction has been exhausted by final judgment, and in support of that position we cite a Florida case, it being the case of Wade, et al. vs. Colwer, 114 Southern Reports, at page 548, in which case the question of jurisdiction was between a State Court and a Federal Court, but I am of the opinion that the same rule should apply with reference to State Courts on account of the Law of which is usually adopted, and in which the proceedings in the Court subsequently equal jurisdiction is suspended until the jurisdiction of the Court first having jurisdiction has been exhausted." (R 207-208).

On June 16, 1947, the Master in the Pennsylvania Court filed his report, (R 226), reporting among other things:

"A change of residence by Libellant pendente lite does not deprive the Court of Common Pleas of Cambria County of Jurisdiction.

"A change of residence by the Libellant after the commencement of a suit and before the trial does not deprive the Court of jurisdiction. 27 CJS 638, Sec. 74. Where the statutory requirements of jurisdiction exist when the Libel is filed, the jurisdiction is not affected by the Libellant's subsequent removal to another state. Sturgeon on Divorce, Sec. 100 (Page 39, citing DelVecchio vs. DelVecchio 21 Dist. 565, Barratt, J.)

"Both the Pennsylvania Courts and Florida Courts can have jurisdiction.

"As previously stated, an action for divorce not being a local one, but being a transitory action, may be brought in any Court of Competent jurisdiction. 27 CJS, 654, Sec. 83. As has been shown, the Court of Common Pleas of Cambria County, Pennsylvania, is a Court of competent jurisdiction, having jurisdiction over the cause of divorce. By statute in Florida, the Circuit Courts as courts of equity have

jurisdiction of divorce actions, Meloche vs. Meloche, 133 Southern Reports, 339; 101 Florida 659, affirmed, 140 Southern Reports, 319; 101 Florida 569. Thus actually both Pennsylvania and Florida Courts can have jurisdiction of the divorce action." (R 215-216).

And on June 28, 1947, the Pennsylvania Court entered the following decree:

"Decree

"Now, June 28, 1947, the findings of fact, conclusions of law and the recommendation of the Master are adopted by the Court and the Libel is dismissed at costs of the Libellant.

By the Court,
McKenrick,
Judge." (R 223).

The trial of the Florida case having been terminated on May 28, 1947, by the filing of Master's Report and the defendant filed exceptions to that report on June 7, 1947, (R 469-470).

On July 14, 1947, defendant filed a motion for leave to amend his answer by alleging the final decree of the Pennsylvania Court as res adjudicata, (R 470), and on July 18, 1947, the Court granted leave to the defendant to amend his answer which was amended on July 21, 1947. On July 24, 1947, plaintiff filed a motion to strike defendant's amendment to his answer, and on July 31, 1947, the Court entered an order granting plaintiff's motion to strike defendant's amendment to his answer setting up the Pennsylvania decree as res judicata and on the same day the Court entered a final decree overruling defendant's exceptions and granting a divorce of a vinculo matrimonii upon the ground that the defendant was guilty of extreme cruelty of a mental nature. The defendant, Morris Gordon, appealed and on September 27, 1948, the Supreme Court of Florida, in the case *Gordon v. Gordon*, (160 Fla. 838, 36 So. 2d. 774), re-

versed that final decree and remanded the cause for further proceedings not inconsistent with the opinion, (R 471).

On January 17, 1949, by leave of the Court, MIRIAM GORDON, filed her amended bill of complaint praying for divorce on the grounds of (1) extreme cruelty, and (2) desertion, and on May 4, 1949, the defendant filed his answer to the amended bill denying that plaintiff was a bona fide resident of the State and denying all other material allegations and alleged the Pennsylvania decree as res adjudicata of the issues, (R 472-473). The case was referred to a Special Master for trial and the trial was had and witnesses and testimony produced on November 21 and 22, 1949, and thereafter on April 21, 1950, the Special Master filed his report, (R 468).

With respect to jurisdictional residence in Florida, the Special Master found:

> "While the exemplified copy of the Pennsylvania proceedings shows that plaintiff filed her suit in Pennsylvania on January 28, 1946, and was a resident of that State on that date, there has been established by corroborated evidence that she established her domicile and residence in this State on June 25, 1946, more than the required period of time before the filing of her bill of complaint. She has continuously resided in Florida since the filing of her bill of complaint, departing from this State only a few occasions for short visits, and from the record as a whole the Master is satisfied that it was and is the intention of the plaintiff to make this State her permanent domicile." (R 477).

With respect to the issue of cruelty and desertion, the Special Master found:

> "There seems to the Special Master to be convincing evidence that after the unfortunate demise of the infant child, the plaintiff quite naturally was emotionally prostrate with grief. The death of a small loved one creates a heavy cross to bear under any circumstances and the accidental drowning of

the child under the facts presented in this case was a misfortune and tragedy, burdensome beyond belief. Accusations by the husband of negligence and lack of care and attention, particularly when made soon after the incident, would visit upon the wife and mother immeasurable mental anguish. The Special Master finds that after weighing all of the evidence it preponderates in plaintiff's favor that this situation confronted her immediately after the death of the child and continued until the separation of the parties.

"Such cruel treatment is, however, not a sufficient ground in this case to dissolve the marriage since that issue has already been decided adversely to the plaintiff by the Pennsylvania Court (even though the plaintiff did not appear and present her evidence in that cause although she had the opportunity to do so.) The Special Master further finds, however, that while the plaintiff was distraught, suffering from frayed nerves and emotional instability, the defendant persisted in his demands for sexual relations over the plaintiff's protests and that they were carried on without any showing of affection or consideration but only to the end of satisfying his desires. Plaintiff remonstrated and told the defendant that under the circumstances, it would only result in a painful experience to her and further aggravate her nervous condition. While this may not have amounted to compulsion by actual physical force, it was a continuing harrowing experience, the escape from which could only be by a separation of the parties. It would seem that such behavior is sufficient to constitute extreme cruelty of a physical nature (*Walker vs. Walker,* 182 So. 274) but in any event, it does make out a case of constructive desertion, for the defendant by his own act brought the cohabitation to an end. It is of no moment which of the married parties leaves the marital home. * * *

"In the Master's opinion, under the facts and circumstances of this case, there is sufficient evidence of defendant's misconduct to have justified the plaintiff in refusing to further live with the defendant and therefore the separation brought about by the defendant's acts constituted constructive de-

sertion of the plaintiff by the defendant." (R 485-487).

The Master further found:

"1. The Court has jurisdiction of the parties and of this cause and of the subject matter hereof.

"2. The Master finds that the plaintiff has established by competent testimony sufficiently corroborated that she became a bona fide resident domiciled in the State of Florida on June 25, 1946, and has made her permanent place of abode in this state since that time.

"3. The Master finds that the evidence preponderates that while the plaintiff was nervous, sick, worried and emotionally unstable because of the accidental death of their child, the defendant accused the plaintiff of being responsible for the child's death by reason of her inattention and neglect, and at the same time compelled the defendant to have intercourse with him against her wishes. Such conduct can be no more adequately described than extreme cruelty of a physical nature.

"4. The Master finds that the separation of the parties on January 2, 1945, was caused by the misconduct of the defendant rendering a continuance of the marital relationship impossible and intolerable to the Plaintiff, affecting her health and general well being to such an extent that should cohabitation be resumed, she would be required to be under the care of a physician constantly thereafter." (R 487-488).

The Pennsylvania law, *Purdon's Pennsylvania Statutes,* Title 23, Section 10, had been introduced in evidence during the trial. The pertinent portions of this Statute are as follows:

"(d) Shall have committed wilful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years; or

"(e) Shall have, by cruel and barbarous treatment, endangeerd the life of the injured and innocent spouse; or

"(f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome;" (R 428).

On May 1, 1950, defendant filed exceptions to the Special Master's Report and on June 8, 1950, the Court entered its final decree, the pertinent portions of which are as follows:

"1. That this Court has jurisdiction of this cause, the parties hereto and the subject matter hereof.

"2. That plaintiff is a bona fide resident of the State of Florida and has been a bona fide, continuous, permanent resident of the State of Florida for a period beginning more than ninety (90) days immediately prior to the commencement of this cause.

"3. That the Report of the Special Master, DAVID W. DYER, hereinbefore filed, be and the same is hereby approved and his findings of fact adopted; the defendant's several exceptions to the Report of the said Special Master are each hereby severally denied.

"4. That the defendant is guilty of (a) Extreme Cruelty by Defendant to Complainant (such cruelty being of a physical nature), and (b) Wilful, Obstinate and Continued Desertion of Complainant by Defendant for one year. The equities of this cause are with the plaintiff and against the defendant, and plaintiff's prayer for divorce a vinculo matrimonii is hereby granted.

"5. That the plaintiff, MIRIAM GORDON, and the defendant, MORRIS GORDON, be and they are hereby divorced, each from the other, a vinculo matrimonii." (R 508-509).

On August 15, 1950, the defendant appealed, (R 537), and thereafter on May 2, 1952, the Supreme Court of Florida entered its opinion:

"That the final decree of divorce granted upon the ground of desertion should be and it is hereby affirmed." Re-hearing was denied May 21, 1952. (59 So. 2d. 40).

PETITIONER'S ASSIGNMENTS OF ERROR

Respondent suggests that an analysis of Petitioner's Assignments of Error shows that by these assignments the Petitioner is attempting to raise two issues as follows:

(a) That the Florida Statutes require,

"In order to obtain a divorce the complainant must have resided ninety (90) days in the State of Florida before the filing of the Bill of Complaint."

Section 65.02 Florida Statutes Annotated,

and the Pennsylvania Court on the trial, at which she was not present and offered no testimony, found that MIRIAM GORDON was a resident of Pennsylvania and had been such a resident from the date of her birth to the date of the trial; therefore, petitioner contends this finding is res judicata on the question of domicile and that the respondent, complainant in the Florida Court, was not domiciled in Florida at all, much less than for ninety (90) days, when her Florida action for divorce was filed.

(b) Petitioner contends that the Pennsylvania Court, after the trial, at which MIRIAM GORDON was not present and offered no testimony, found that no facts existed which would support her charge that Morris Gordon was guilty of "indignities to her person"; therefore, petitioner contends all facts existing prior to the commencement of the Pennsylvania action were res judicata and no testimony as to Morris Gordon's conduct prior to the commencement of the Pennsylvania libel was available or could be heard by the Florida Court in support of complainant's action in Florida for divorce on the ground of desertion.

Petitioner's Assignments of Error Nos. 1 and 6, seem to fall under his contention (a) above, and his Assignments of Error Nos. 2, 3, 4, 5 and 6, seem to fall under his contention (b) above.

RESPONDENT'S PROPOSITIONS OF LAW

Respondent contends that the Pennsylvania Statutes require, as a jurisdictional prerequisite, that libellant must have resided within that state for at least one year prior to filing the libel,

> See: PURDON'S, Pennsylvania Statutes Annotated, Title 23, Paragraph 6; Acts of 1929, P.L. 1237, Paragraph 16.

Respondent further contends that the Pennsylvania Statute requires that in order for an injured and innocent spouse to be able to obtain a divorce on the ground of desertion, that desertion must have continued for and during the term and space of two years,

> See: PURDON'S Pennsylvania Statutes, Title 23, Section 10, Acts of 1943, Public Law 21, Act No. 10.

The propositions affirmatively submitted by respondent in opposition to the petition for Writ of Certiorari are:

1. A final decree of dismissal granted by a state court of competent jurisdiction, where the parties have appeared, is not entitled to full faith and credit in a subsequent action in another state with respect to a question not within the issues as they were made or tendered by the pleadings and cannot operate as res judicata and be conclusive evidence of a fact sought to be established by it, if the fact was not a material one in the former action and not necessary to uphold the former judgment, that is, not responsive to the issue presented.

2. A final decree of dismissal, granted by a state court, where the parties have appeared, is not entitled

to be held res judicata in an action in another state between the same parties upon a different cause of action which had not ripened or matured under the statutes of that state, or was not available under the statutes of that state at the time of the insitution of the action which resulted in the judgment of dismissal.

SYNOPSIS OF ARGUMENT

Respondent contends that the doctrines laid down by this court in the cases of *Williams v. North Carolina,* 325 U.S. 226, and *Johnson v. Mullberger,* 340 U.S. 581, are not applicable to the cause now before you.

The *Williams v. North Carolina* case, supra, laid down the proposition that where a state court found that jurisdictional residence existed and granted a divorce, this finding in the final decree did not prevent the courts of another state from inquiring into the question of whether or not fraud had been practiced on the court, by the plaintiff, in producing the testimony leading to the entry of such final judgment.

On the other hand in the *Johnson v. Mullberger* case, supra, this court changed the former doctrine somewhat and held that where a judgment was entered in a state court in which both plaintiff and defendant had appeared and in such judgment the state court found and held that jurisdictional residence existed, then such judgment was thereafter forever res judicata on the question of jurisdictional residence and no court of another state could inquire into the matter.

Neither phase of the problem, considered above, is involved in petitioner's application for certiorari. The Florida Supreme Court recognized that the Pennsylvania Court had jurisdiction by reason of MIRIAM GORDON'S jurisdictional residence in Pennsylvania prior to the commencement of her action there, but the Florida Court held that when the Pennsylvania Court attempted to adjudicate with respect to questions not in issue before it, that is the question of whether or not

MIRIAM GORDON had changed her domicile subsequent to filing the Pennsylvania suit, such attempt by the Pennsylvania Court was not entitled to be recognized as res judicata on that question because it was not responsive to the issues and not necessary for the determination of the cause in Pennsylvania.

In support of this position we cite:

Reynolds v. Stockton, 140 U.S. 254;

30 Am. Jur. 927-28, Paragraph 182—"Matters not subject to Adjudication in Previous Action."

"Effect on jurisdiction of Court to grant divorce pendente lite."

7 A.L.R. 2d Annotation, Page 1414."

The above argument is presented in extended form under "Argument on First Proposition."

Respondent also submits that each statutory ground for divorce constitutes a separate cause of action and that desertion for the statutory period is not the same cause of action as that presented in the Pennsylvania libel wherein plaintiff charged that Morris Gordon was guilty of indignities to her person. Pennsylvania recognizes that desertion is a different ground from the one charged and requires that the desertion exist for two years before the libellant is entitled to a decree of divorce. Florida, on the other hand, holds that desertion need exist for one year in order to entitle plaintiff to a divorce, see, *Purdon's Pennsylvania Statutes, Title* 23, *Section* 10, (*d*), (*f*), and *Section* 65.04 (4), (7), *Florida Statutes Annotated.* The action in Florida being upon a different claim or demand, the Pennsylvania judgment is not res judicata, see, *Cromwell v. Sac Co.*, 94 *U.S.* 351. It should be further noticed that the mistreatment complained of by the wife need not be, of itself, sufficient to constitute grounds for divorce in order to justify her in separating from her husband and, therefore, the Pennsylvania judgment dismissing the libellant's charge that the defendant was guilty of in-

dignities to her person is not res judicata of the proposition that even though his conduct would not justify a divorce upon that ground, his conduct might be sufficient to justify a court in finding and holding that she was entitled to leave him and if the separation continued for the statutory period she would be entitled to a divorce on the ground of desertion. In support of the foregoing argument we have cited:

17 Am. Jur. 201 Paragraph 101;
Johnson v. Johnson, 125 Ill. 510;
Cochrane v. Cochrane, (Mass) 22 N.E. 2d 6;
Spafford v Spafford, (Ala). 74 So. 354;
Prall v. Prall, 58 Fla. 496, 50 So. 867;
Gordon v. Gordon, 160 Fla. 838, 36 So. 2d. 774;
Gordon v. Gordon, (Fla.) 59 So. 2d. 40;

Extended argument on this proposition is submitted under "Argument on Second Proposition."

ARGUMENT ON FIRST PROPOSITION

There were only two issues raised by the pleadings (libel and answer) in the Pennsylvania suit, i.e., (1) was the libellant, MIRIAM GORDON, a "citizen and resident of the State of Pennsylvania for more than one whole year previous to the filing," of the libel for divorce, (R 110), and (2) was the defendant, Morris Gordon, guilty of offering such indignities to libellant's person as to render her condition intolerable and her life burdensome (R 111).

As to issue (1), the petitioner contends, by his assignments of error Nos. 1 and 6, that the findings of the Special Master, to-wit:

> "3. *Citizenship.* The libellant has been a resident and citizen of the State of Pennsylvania all her life; and the respondent has also been a resident and citizen of Pennsylvania, since 1938, until he removed to Baltimore, Maryland," (R 211),

and,

> "Further Paragraph 7 of the libel in divorce states that the present residence of the libellant is

> 100 Marion Street, Westmont Borough, Cambria County, Pennsylvania, which was undisputed at the hearing inasmuch as libellant did not appear nor was she represented by counsel * * * *, On the basis of these facts, it is felt that the libellant is domiciled in Westmont Borough, Cambria County, Pennsylvania, and thus is not presently domiciled in the State of Florida",

adopted by the Court in its decree, (R 223), renders that decree res judicata of the domicile of MIRIAM GORDON during the entire period of the Pennsylvania litigation

While it is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there jurisdictionally determined or conclusively settled by a judgment therein become res judicata, nevertheless, it is equally fundamental that such a judgment is not conclusive with regard to a question which, from the nature of the case and the issues presented, was not responsive to the issue.

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. *The first and obvious reason is that the judgment of the supreme court of New York was not responsive to the issues presented.* The section of the Federal Constitution which is invoked by plaintiffs is section 1 of article IV., which provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand* * * * * * that a judgment rendered by a court which has jurisdiction of the person, but *which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State.*"

REYNOLDS v. STOCKTON, 140 US 254, 35 Law Ed., 464. (Italics supplied).

"* * *On the ground that a judgment rendered by a court on matters outside the issues submitted for its determination stands upon the same footing as one dealing with a subject matter entirely foreign to its jurisdiction, it has been held that the doctrine of res judicata operates only as to questions within the issues as they were made or tendered by the pleadings, and does not extend to matters which might have been litigated under issues formed by additional pleadings. Frequently, it is also declared that in order that a judgment may operate as res judicata and be conclusive evidence of a fact sought to be established by it, it must appear that the fact was a material one in the former action, that the determination of facts which were not necessary to uphold the former judgment does not conclude the parties, * * *"

30 Am. Jur., 927, Par. 182.

The Pennsylvania Statute requires, as a jurisdictional prerequisite, that the libellant for divorce must have resided within the State for at least one year prior to filing the libel:

Purdon's Pennsylvania Statute Annotated, Title 23, Paragraph 16; Acts of 1929, Public Law 1237, Paragraph 16.

The only jurisdictional question then, was not whether the libellant continued to reside in Pennsylvania after filing the libel, but on the contrary, was whether or not she had been a resident of Pennsylvania for more than one year prior to filing the suit.

"ANNOTATION

"Effect or jurisdiction of court to grant divorce, of plaintiff's change of residence pendente lite.

"General Rule.

"It seems to be the uniform rule, in the absence of an express statutory provision to the con-

trary, that if the plaintiff in a suit for divorce satisfies residential requirements at the time of commencing proceedings, the court's jurisdiction will survive his change of domicil.

"This result may rest on either of two grounds: (1) The statutes prescribing qualifications of residence nearly always contain the phrase 'at the time of commencing suit' or equivalent language; and (2) the situation is one to which the familiar equitable principle, that once a court has obtained jurisdiction of a cause, it will not be surrendered until the equities of all parties have been dealt with, applies.

"Colorado.-McMillin v. McMillin (1945) 114 Colo 247, 158 P2d 44, 160 ALR 396 (dictum).

"Delaware.—Long v. State (1949) - Del -, 65 A2d 489, revg (Del Gen Sess) 59 A2d 545 (applying law of Arkansas? See statement of this case, infra, under heading 'Under Arkansas statute').

"Indiana.—Waltz v. Waltz (1862) 18 Ind 449.

"Oklahoma.—Jackson v. Jackson (1949) - Okla -, 205 P2d 297, 7 ALR 2d 1410.

"Pennsylvania.—Platt v. Platt (1943) 26 Erie Co LJ 154.

"Texas.—Van Dyck v. Van Dyck (1938, Tex Civ App) 121 SW2d 642 (compare with Michael v. Michael (1904) 34 Tex Civ App 630, 79 SW 74); Williams v. Williams (1941, Tex Civ App) 146 SW2d 1013.

"Washington.—Polk v. Polk (1930) 158 Wash 242, 290 P 861.

"Wyoming.—Duxstad v. Duxstad (1909) 17 Wyo 411, 100 P 112, 129 Am St Rep 1138."

7 ALR 2d, 1414.

Under the uniform general rule above stated, to which Pennsylvania adheres, the question of whether or not MIRIAM GORDON, changed her domicile pending suit for divorce was immaterial. The only material question with respect to jurisdiction which was raised

by the issues in the Pennsylvania suit was the question of whether MIRIAM GORDON was a resident at the time of filing the libel and had been such a resident for more than one year on that date. The finding by the Pennsylvania Court, after an ex-parte trial, that MIRIAM GORDON was then and always had been a resident of Pennsylvania and not a resident of Florida was immaterial, not responsive to the issues made by the pleadings, and since the controversy did not turn upon that finding of "alleged" fact, the judgment on this point does not conclude the parties in reference to that issue.

ARGUMENT ON SECOND PROPOSITION

Each separate statutory ground for divorce, by the weight of authority, constitutes a separate cause of action and this rule has long been recognized in Florida.

PRALL v. *PRALL*, 58 Fla. 496, 50 So. 867.

The libel in Pennsylvania alleged that Morris Gordon, the respondent, did, on or about the 23rd day of November, 1944, and many times previous to said date, offer such indignities to her person as to render her condition intolerable and her life burdensome, (R 111). This charge is the same as the Florida charge of extreme cruelty of a mental nature.

> "This Court has recognized two types of 'extreme cruelty'—one physical, the other mental. Apparently Pennsylvania, through its legislative body, has also given cognizance to this distinction by providing separate grounds for divorce, to-wit: 'indignities to the person' and 'cruel and barbarous treatment' which endangers the life of the injured and innocent spouse. The former ground appears from the adjudications of the Pennsylvania Courts to fall into our classification of mental cruelty and the latter into the category of physical cruelty."
>
> *GORDON* v. *GORDON*, 160 Fla. 838, 36 So. (2d) 774.

The original complaint filed in Florida on September 30, 1946, charged that the defendant, Morris Gordon, was guilty of extreme cruelty by defendant toward plaintiff, habitual indulgence in violent and ungovernable temper, and wilful, obstinate and continuous desertion of the plaintiff by the defendant for one year. So in reality, that complaint stated four causes of action,

(a) Cruelty of a physical nature,

(b) Cruelty of a mental nature,

(c) Violent and ungovernable temper,

(d) Desertion.

On the original trial the plaintiff elected to prove only cruelty of a mental nature and the final decree was reversed by the Florida Supreme Court in the case, Gordon vs. Gordon, supra. The amended bill of complaint charged that the defendant, Morris Gordon, was guilty of,

(a) Cruelty of a physical nature, and

(b) Desertion.

On final hearing, the Circuit Court, Dade County, Florida, held that the defendant was guilty of extreme cruelty of a physical nature and was also guilty of desertion. On the second appeal, the Supreme Court of Florida held that the evidence as to defendant's cruel conduct did not amount to physical cruelty but held that the defendant's conduct amounted to desertion and, therefore, affirmed the final decree of divorce (see Gordon vs. Gordon, 59 So. 2d, 40).

The gravamen of the case proved by MIRIAM GORDON against her husband, was that the mistreatment of her by him was such as to justify her in refusing to live with him and further, i.e., that he was guilty of constructive desertion.

Before proceeding further with the discussion, we suggest that this Court has recognized that a decree or

judgment in one case does not necessarily operate as res judicata of a second action between the same parties.

> "Where the second action, between the same parties, is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered."
>
> *CROMWELL v. SAC COUNTY,* 94 U.S. 351; 24 Law Ed. 195.

We believe that pronouncement was in recognition of the principle that the denial on the merits of a divorce for the ground alleged in the prior action is not necessarily a bar to a subsequent action by the same spouse for a divorce for another distinct and separate ground existing at the time of the first action, see, 17 Am. Jur. 404, *Prall v. Prall,* 58 Fla. 496, 50 So. 867, Morrison v. Morrison, 142 Mass. 361, 8 NE 59, Re Pietsch, 25 Pa. D. & C. 436.

In this case, since the last decree is upon an entirely different cause of action than the one pursued in Pennsylvania, the doctrine of res judicata does not apply. It is also true that the doctrine of estoppel is not applicable because although the Florida statute makes desertion for one year a ground for divorce, the Pennsylvania statute says:

> "(d) Shall have committed willful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the term and space of two years;"
>
> (Purdon's Pennsylvania Statutes, Title 23, Section 10; Acts of 1943, P.L. 21 - Act No. 10).

According to the evidence the separation of the parties could not have occurred prior to November 23, 1944, though the evidence shows that the defendant husband packed his clothes and left the home usually occupied by the parties, in the last week of December,

1944, and that the parties have never occupied the same home at any time since and have never lived together at any time since. Whether the desertion is said to have commenced in November, 1944, or in December, 1944, or on January 2, 1945, the date of the last conference between the parties, the statutory period prescribed by Pennsylvania had not run when MIRIAM GORDON filed her libel for divorce against Morris Gordon, January 28, 1946. Under these circumstances neither estoppel nor res judicata apply.

> "Either spouse may by reason of misconduct or cruelty drive the other away, in which case the former, and not the latter, is the deserter or guilty of desertion. In other words, the conduct of one of the parties may justify separation from him or her by the other and confer the right upon the latter to obtain a divorce upon the ground of willful desertion."
>
> *17 Am. Jur.*, p. 201. par. 101.
>
> "To constitute Constructive Desertion, it is not necessary to show that the defending spouse misconducted himself or herself with the intent of forcing the other to leave the home; nor is it necessary that there should have existed in connection with the acts of cruelty any settled purpose to drive away the other. It is enough if such is a natural consequence of the acts.* * * In many jurisdictions, however, the rule adopted does not require the misconduct to be such as in itself would have been a ground for divorce."
>
> *17 Am. Jur.* p. 202, par. 101.
>
> "If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions, and if so intended, her leaving him would, in the case put, be desertion on his part and not by the wife."
>
> *JOHNSON v. JOHNSON*, 125 Ill. 510.

From the foregoing authorities it is apparent that even though the evidence produced by the plaintiff in Florida, (she produced none in Pennsylvania), has been judicially ascertained, through the doctrine of res judicata, to be insufficient to justify the entry of a decree of divorce upon the ground of indignities to her person or extreme cruelty of a mental nature, yet those facts were such as would justify her in ceasing to live with him even though they have been determined not to amount to grounds for divorce in and of themselves; therefore, since she was justified in ceasing to live with him, he is the deserter, for the Courts have said:

> "It is settled that ill-treatment or misconduct of the husband of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce may yet justify her in leaving his house and preventing his obtaining a divorce on the ground of desertion if she does."
>
> *COCHRANE v. COCHRANE,* (Mass.), 22 N.E. 2d. 6.
>
> "In order to justify the withdrawal by one spouse from the home and society of the other, it is well settled in this State, *in accord with the weight of reason and authority,* that the provoking cause or causes need not be such as would entitled the injured spouse to a divorce."
>
> *SPAFFORD v. SPAFFORD,* (Ala.) 74 So. 354.

Florida Court Gave Full Faith and Credit to Every Justiciable Point and Question Decided By Pennsylvania Court

The Supreme Court of Florida, in the judgment which petitioner seeks to have reviewed, gave every consideration to the judgment of the Pennsylvania

Court. The pertinent portions of the opinion of the Supreme Court of Florida (59 So. 2d. 40) are here quoted:

> "It was our opinion and judgment upon the first appearance of the instant suit in this Court that the Pennsylvania Court's final decree should have been given full faith and credit because we determined that both suits were predicated upon the same cause of action after concluding that the testimony which was presented by the appellee in her Florida suit was 'essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person', had she pursued her action in Pennsylvania where she was given ample notice and opportunity to be heard.'
>
> "Upon remand to the Circuit Court appellee amended her bill of complaint. In and by her amendment she reiterated her charge of extreme cruelty and elaborated thereon. She also reasserted that the appellant had been guilty of desertion which she contends was constructive in character." (at p. 42)
>
> "We will first deal with the question whether the Pennsylvania decree should have been given full faith and credit and whether it operates as a bar to the entry of the final decree now under review." (at p. 43)
>
> "We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res adjudicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and de-

termined in the initial action are foreclosed—not other matters which 'might have been, but were not, litigated or decided.' *Prall v. Prall,* 58 Fla. 496, 50 So. 867, 870, 26 L.R.A., N.S., 577; *Bagwell v. Bagwell,* supra. The test proper to be applied in a divorce action in order to decide whether the second suit is founded upon a new and separate cause of action is not simply whether a different statutory ground for divorce is asserted but whether the facts necessary to the maintenance of such suit are essentially the same as those which were relied upon to establish plaintiff's alleged right to a decree in the first action and whether the decree or judgment sought in each requires the same decree of proof to justify or sustain it. If the degree of proof required in the first suit is greater than that required in the second the cause of action cannot be held to be the same and estoppel by judgment is the proper test to be applied." (at pp. 43-44)

" 'It is the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment'." (at p. 44)

"We hold the view that the expression 'precise facts' has been, and should be, given the same signification as the word 'every point and question'." (at p. 45)

"The issue, point and question in Miriam Gordon's Pennsylvania action against her husband was whether she was entitled to a final decree of divorce upon the ground of 'indignities to the person' which we in *Gordon v. Gordon,* supra, likened unto extreme cruelty of a mental nature. The issues—the points and questions—in the instant suit are: (1) Was Miriam Gordon justified in temporarily separating from her husband; (2) If she was justified in such action, did Morris Gordon perform the duty cast upon him by the law of attempting a reconciliation in good faith; (3) Was he excused from performing such duty because under the facts and circumstances of the case an attempt at reconciliation would manifestly have been unavailing.

"It is clear that none of the issues presented in and by the present suit, insofar as it is predicated upon 'constructive' desertion is concerned, was adjudicated in the Pennsylvania action. Moreover, no one of the issues in this suit was a justiciable issue, that is to say one proper to have been adjudicated, in the Pennsylvania litigation." (at p. 47)

"It is true that the facts relied upon by Miriam Gordon in her Pennsylvania suit in which she sought an absolute divorce on the ground of 'indignities to the person' would have been essentially the same, had she appeared and testified, as the facts which she presented in this Florida action. However, the degree of proof necessary to entitle her to the relief which she sought in the former action—a final decree of divorce upon the ground of 'indignities to the person'—was greater than the degree of proof required to establish that she was justified in temporarily separating from her husband. Consequently, it would be illogical to say that the issues—the points and questions—which were heard and determined in Miriam Gordon's Pennsylvania suit were the same as those existing in the current Florida action or that the cause of action in both suits was identical. This being so, neither estoppel by judgment nor res adjudicata forms a basis for invocation of the full faith and credit clause of the Federal Constitution." (at p. 47)

"Since we have concluded that appellee was justified, because of the conduct of her husband toward her, in temporarily separating from him there is no question that appellant should have attempted a reconciliation and such attempt should have been made in good faith." (at p. 48)

"He has never, according to this record, evidenced a truly repentent attitude, nor has he actually sought his wife's forgiveness and expressed an earnest purpose to refrain in the future from his accusations concerning her asseverated carelessness in connection with the tragic death of their

son which caused their common heartache. Indeed, upon their final conference, about January 2, 1945, when appellee told appellant why she found it necessary to leave him and why she felt she could not return to him, he remained silent insofar as any attempt at reconciliation was concerned and immediately began to make demands with reference to a settlement of their property rights. He has taken the position in this litigation that there was nothing he had done for which he should seek forgiveness, nor was there anything he had done that he should promise to refrain from doing in the future." (at p. 48)

"Under these circumstances we are compelled to agree with the Chancellor's conclusion that no good faith attempt at reconciliation was ever made by appellant.

"We conclude that the Pennsylvania decree should not be held to operate as res adjudicata upon the final decree now under review for the cause of action was different in that suit, nor should it be held to work an estoppel by judgment as to the appellee's cause of action herein, to wit: (constructive) desertion because the issues—points and questions actually litigated and determined—were not the same in both actions. Therefore, such decree is not a bar to this suit for it is not entitled to full faith and credit. It is further our conclusion that the final decree of divorce granted upon the ground of desertion should be and it is hereby affirmed." (at p. 48)

GORDON v. GORDON, 59 So. 2d 40.

CONCLUSION

We respectfully submit that this case presents no substantial and serious legal questions involving the final decrees of two states of the United States and we contend that the decrees brought forward by petitioner are not inconsistent. We contend that the decree of the Supreme Court of the State of Florida, which petitioner

seeks to bring before this Court is not a denial of the full faith and credit demanded by the Constitution of the United States.

We respectfully submit that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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